

JO-CARROLL ENERGY, INC.,)

Complainant,)

vs)

Case No. 02-0593

ALLIANT d/b/a INTERSTATE POWER)
& LIGHT CO.,)

Respondent.)

REPLY BY JO-CARROLL ENERGY INC.,
TO MOTION TO STRIKE FILED BY
ALLIANT DBA INTERSTATE POWER & LIGHT CO.

JO-CARROLL ENERGY, INC., Complainant (Jo-Carroll), by its attorneys

GROSBOLL, BECKER, TICE & REIF, Jerry Tice of counsel, for its Reply to the Motion
filed by ALLIANT d/b/a INTERSTATE POWER & LIGHT CO., Respondent, (Interstate) to
dismiss Count II of Jo-Carroll's Amended Complaint states as follows:

I. STATUS OF PLEADINGS.

Jo-Carroll's Amended Complaint consists of two counts. Count I is a claim for the
right to serve the Jamie Rowe property pursuant to Section 8 of the Electric Supplier Act
(ESA). Count II is a claim pursuant to Section 6 of the ESA alleging that Jo-Carroll and
Interstate prepared maps designating respective territories in the area of the Jamie Rowe
residence that each would have the right to serve subject to approval of such maps by the
Illinois Commerce Commission pursuant to Section 6 of the ESA. Interstate has filed an
Answer to both Count I and Count II.

Count II makes the following allegations which by Interstate's Answer it has either

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admitted or denied as follows:

1. Jo-Carroll is an Illinois not-for-profit Corporation providing electric service in Jo Daviess and Carroll Counties, Illinois - admitted by Interstate.

2. Interstate is a public utility as defined in the Public Utility Act and is engaged in furnishing and distributing electric energy in Jo Daviess and Carroll Counties, Illinois - admitted by Interstate.

3. Both Jo-Carroll and Interstate are electric suppliers as defined in Section 30/3.5 of the ESA - admitted by Interstate.

4. Jo-Carroll received a notice dated August 26, 2002 from Interstate stating that Interstate intended to serve the Jamie Rowe premises on No. Indian Road, East Dubuque, Illinois located in the East 70 acres of the North Half of Section 26, Township 29 North, Range 2 West, Menominee Township, Jo Daviess County, Illinois and that a copy of the Interstate notice received by Jo-Carroll August 27, 2002 was attached as Exhibit 1 to the Complaint - admitted by Interstate.

5. On or about September 26, 1996 Jo-Carroll and Interstate prepared a map of the Menominee Township, Jo Daviess County, Illinois area and a copy of the map so prepared is attached as Exhibit 2 to the Amended Complaint - admitted by Interstate.

The aforementioned map identified the respective territory/premises that each of Jo-Carroll and Interstate would serve within that portion of Menominee Township identified on the map - denied by Interstate.

6. Pursuant to the aforementioned map the properties north of the highlighted line thereon would be served by Interstate and the properties lying south of the highlighted line

thereon would be served by Jo-Carroll. Connie M. Shireman, as President/CEO of Jo-Carroll and Sam H. Hass as Division Manager of Interstate signed the maps and by virtue thereof designated the territories that each of the respective suppliers would serve subject to approval by the Illinois Commerce Commission pursuant to Section 6 of the ESA. Subsequent to September 26, 1996 each of the suppliers acted in reliance upon the map so prepared with respect to providing electric service to the area evidenced by the map. That Interstate extended electric service to a customer on Interstate's side of the map territorial boundary line even though the customer would otherwise have been in closer proximity to Jo-Carroll's 1965 existing lines and would be thereby authorized to be served by Jo-Carroll instead of Interstate but for the aforementioned map - Interstate first answered the allegations of paragraph 6 by denying the same and then moved to strike paragraph 6.

7. The customer, in this docket, Jamie Rowe, is located on the Jo-Carroll side of the aforementioned territorial service line as evidenced by the aforementioned map and thus Jo-Carroll is entitled to serve such customer should the division of service territories between Jo-Carroll and Interstate be approved by the Commission - Interstate first answered the allegations of paragraph 7 by denying the same and then moved to strike paragraph 7.

8. Each of Jo-Carroll and Interstate on July 2, 1965 and on September 26, 1996 had and at the current time have existing electric facilities in Menominee Township, Jo Daviess County, Illinois and that the proposed map designating territory of Jo-Carroll and Interstate did not result in an alteration of the provision of electric service to any of the customers of Jo-Carroll or Interstate existing at the time of such map designations - admitted by Interstate.

The purpose for which Jo-Carroll and Interstate agreed to designate their exclusive

service territories on September 26, 1996 as evidenced by the aforementioned map was to avoid duplication of their respective electric facilities and to avoid disputes between Jo-Carroll and Interstate as to which of the two electric suppliers would be entitled to serve in the areas identified on the map - denied by Interstate.

9. The designation of exclusive service territories by Jo-Carroll and Interstate on September 26, 1996 was and is in the public interest - Interstate first answered the allegations of paragraph 9 by denying the same then moved to strike paragraph 9 of Count II.

10. In the event the Illinois Commerce Commission finds the arrangement evidenced by the aforementioned map and designation of territories by Jo-Carroll and Interstate conforms with requirements of Section 6 of the Act, Jo-Carroll is entitled to provide electric service to the customer, Jamie Rowe, at issue in this docket - denied by Interstate.

II. IT IS IMPROPER FOR INTERSTATE TO BOTH ANSWER AND AT THE SAME TIME MOVE TO STRIKE COUNT II OF THE COMPLAINT.

Interstate cannot both file an Answer either admitting or denying substantive allegations of Count II and at the same time move to strike substantive allegations of Count II. Once Interstate answers Count II it waives any defect in the Complaint. As noted by the Court in Burks Drywall, Inc. v Washington Bank 110 Ill App 3d 569; 442 NE 2d 648; 66 Ill Dec 222, 225 (2nd Dist. 1982) where the bank defendant answered the plaintiff's complaint then filed a motion to dismiss on the basis the complaint failed to state a cause of action, the court held the defendant bank waived any defect in the complaint even though imperfectly alleged (page 225). To the same effect is Arora v Chui 279 Ill App 3d 321; 664 NE 2d 1101; 216 Ill Dec 173, 176-177 (2nd Dist. 1996) where the court noted that the best measure of a complaint's

sufficiency is whether the defendant is able to answer it (page 176). Accordingly, Interstate's Motion to Strike portions of Jo-Carroll's Amended Count II after both admitting and denying allegations therein is not proper and Interstate's claim that Jo-Carroll's Count II is insufficient in law is waived. Accordingly, Interstate's Motion to Strike Count II must be denied.

Interstate's Answer thereto would stand and the parties would be at issue.

Additionally, the procedure that Interstate has sought to invoke, that is admitting and denying substantive allegations of Count II of the Amended Complaint and at the same time filing motions to strike Count II and/or portions thereof cannot be allowed for the simple reason that a motion to strike constitutes an admission of facts alleged in the Complaint. Thus, when the Commission considers Interstate's Motion to Strike it must consider that all facts set forth in the Amended Complaint Count II are true and correct. Yet Interstate has also filed an Answer both admitting and denying the allegations of Count II. Those two procedural remedies used by Interstate are inconsistent. Thus, Interstate's Motion to Strike must be denied since Interstate has answered and placed Count II at issue.

III. THE CIVIL PRACTICE ACT PROVIDES THE GOVERNING RULE IN THE INSTANT CASE.

The general rule is that the Civil Practice Act of the State of Illinois does not apply to an agency proceeding where that agency has its own set of procedural rules. However, where as here the agency does not have any rule that specifically governs the procedural issue at hand, the appropriate practice is for the agency to apply the rule utilized by the courts of the State of Illinois Village of South Elgin v Waste Management of Illinois, Inc. 64 Ill App 3d 565; 381 NE 2d 778; 21 Ill Dec 451, 455-456 (2d Dist. 1978). In the instant case the Illinois

Commerce Commission Rules of Practice 83 Ill Adm Code part 200 do not have a specific rule governing the question whether or not a party may file both an answer to a complaint as well as a motion to strike as was done by Interstate in this case or upon filing a Motion to Strike whether the allegations of the complaint sought to be stricken are deemed to have been admitted for purposes of determining the Motion to Dismiss. Thus the rules guiding courts of the State of Illinois control the procedure to be followed by the Commission when Interstate both answers and at the same time moves to strike. Thus Interstate's answer waives any defect in Jo-Carroll's complaint and the parties are at issue by virtue of Interstate's answer.

IV. ALL FACTS ALLEGED IN THE COMPLAINT ARE DEEMED ADMITTED
FOR PURPOSES OF A MOTION TO STRIKE.

If for argument purposes Interstate's Motion to Strike is allowed to stand, then Interstate's motion should be denied. Interstate filed its Motion to Strike Count II of the Amended Complaint claiming it to be "substantially insufficient in law". While 200.190 of the Rules of Practice of the Commission authorize the filing of Motions to Dismiss, the rules do not establish procedures for dealing with such motions. Thus, pursuant to Village of South Elgin v Waste Management of Illinois, Inc., supra, the procedure followed in State courts regarding Motions to Dismiss should be the guide for the Commission in the instant case. Motions filed under the Civil Practice Act pursuant to 735 ILCS 5/2-615 go to the question of whether or not the pleading or any portion thereof should be stricken because it is:

"substantially insufficient in law ,or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth."

Since Interstate has stated that its Motion to Strike is based upon the reason that Jo-Carroll's Count II of the Amended Complaint "is substantially insufficient in law", it must be assumed that the basis for Interstate's Motion to Strike is the correlary State court procedure found in 735 ILCS 5/2-615. When Motions to Strike are filed under Section 5/2-615, the facts alleged in the Complaint are deemed to be admitted for purposes of determining the Motion to Strike. The allegations of Jo-Carroll in Count II are as follows:

1. That Jo-Carroll and Interstate met to prepare the map in question and that Jo-Carroll and Interstate designated territories that each would serve based upon the maps.
2. That each of Jo-Carroll and Interstate by their designated representatives signed the map.
3. That each of Jo-Carroll and Interstate relied upon such maps as evidenced by their subsequent actions regarding electric service provided within the area covered by the map after preparation of the map and signatures of the parties being placed thereon.
4. That the intention of the parties was to designate their respective territories as evidenced by the map in question.
5. That the intention of the parties was to seek approval of the Illinois Commerce Commission for such designated territories for providing electric service to respective customers.
6. That both Jo-Carroll and Interstate have electric service facilities in the area covered by the map in question.
7. That each of Jo-Carroll and Interstate intended for the designation of the territories to avoid duplication of their respective electric facilities in the future when providing electric

service to customers in the area covered by the map.

8. That each of Jo-Carroll and Interstate intended to avoid disputes between each of them with respect to electric service to customers locating in the area affected by the map.

Accordingly, Jo-Carroll's Count II of the Amended Complaint has set forth facts which if true show that Jo-Carroll and Interstate intended to create a contract between the two of them represented by the map and the territory designated thereon within which each of the two electric suppliers would serve subject to approval of the same by the Illinois Commerce Commission. Count II of Jo-Carroll's Amended Complaint does nothing more than seek approval from the Commission for the map and agreement between Jo-Carroll and Interstate designating the territories that each of Jo-Carroll and Interstate would respectively have exclusive service rights in. In addition, should the Commission approve such map, Count II seeks an order authorizing Jo-Carroll to serve the customer at issue in this docket since that customer is located on Jo-Carroll's side of the boundary line as designated by the aforementioned map.

The elements of Section 6 of the Act authorize Jo-Carroll and Interstate to meet and prepare maps representing service areas each will serve subject to Commission approval. Jo-Carroll alleges and Interstate admits that both met, prepared the map designating territory in Menominee County as either Jo-Carroll's or Interstate's territory and Jo-Carroll alleges and Interstate admits the principal officers of each signed the map. Jo-Carroll alleges the map is intended to designate exclusive service territories of each and that the designation of the map territories is intended to avoid duplication of electric facilities and avoid disputes between Jo-Carroll and Interstate. Even though Interstate may now wish to dispute those allegations, the

allegations are deemed admitted for purposes of the Interstate Motion to Strike Monroe Dearborn Limited Partnership v Board of Education of the City of Chicago 271 Ill App 3d 457; 648 NE 2d 1055; 208 Ill Dec 133, 135 (1st Dist. 4th Div. 1995). Further those allegations set forth the elements which, if true, form the basis of the Service Area Agreement authorized by Section 6 of the ESA. Thus the allegations of Count II of the Amended Complaint state a cause of action sufficient to have the Commission determine whether an Agreement pursuant to Section 6 of the ESA was entered into between Jo-Carroll and Interstate and if so whether such Agreement should be approved.

V. INTERSTATE RAISES AFFIRMATIVE MATTERS IN ITS MOTION TO STRIKE WHICH ARE IN THE NATURE OF AFFIRMATIVE DEFENSES AND ARE THEREFORE DECIDED ONLY AFTER AN EVIDENTIARY HEARING.

Interstate in its Motion to Strike Count II claims the Commission has not approved the Agreement. Yet Interstate admits the existence of the map but denies the intent regarding the same. However, Interstate has not filed any affidavits supporting its claims regarding the parties' intent. Further this form of allegation constitutes an affirmative defense which after being placed in issue requires the Commission to hear evidence regarding the same.

In addition, Interstate has, as alleged in the Complaint, exercised its rights under the map with regard to the designated territory by connecting electric service to a customer post the creation of the map and the arrangement between Interstate and Jo-Carroll which customer is located on Interstate's side of the boundary established by the map in question. As alleged in the Complaint Jo-Carroll acting in reliance on the map, the actions of Interstate, and the

alleged intention of the parties took no action with regard to the connection of such service. Interstate should be estopped from rejecting the map after accepting the benefits Estate of Leonard E. Besinger v the Village of Carpentersville 258 Ill App 3d 218; 630 NE 2d 178; 196 Ill Dec 481, 490 (2nd Dist. 1994).

In its Motion to Strike, Interstate claims that the map marked Exhibit 2 states that the parties "looked at" the map and alleges that such wording negates any intent to enter into a contract for submission to the Commission. Such constitutes a denial of Jo-Carroll's allegation regarding the intent of the parties with respect to the map and places in issue the interpretation of the phraseology. Certainly that phraseology can be considered ambiguous requiring oral testimony to explain its meaning as well as to explain the intent of the parties in creating such map and thereafter relying upon the same in determining electric service rights as between Jo-Carroll and Interstate. Questions regarding interpretation of ambiguous contracts are not properly the subject of motion practice Monroe Dearborn Limited Partnership v Board of Education of the City of Chicago 271 Ill App 3d 457; 648 NE 2d 1055; 208 Ill Dec 133, 138 (1st Dist. 4th Div. 1995). These claims of Interstate are in the nature of affirmative defenses and once placed in issue can only be resolved by an evidentiary hearing. Further for purposes of Interstate's Motion to Dismiss, the allegations of the intent of Jo-Carroll and Interstate in creating the map and designating territory is deemed admitted.

The fact that the map has not heretofore been submitted to the Commission does not negate its validity nor the intent of the parties in creating such map. What Jo-Carroll is requesting the Commission to do is determine that Jo-Carroll and Interstate formed an agreement regarding service territory when they prepared the map in question, determine that

the designation of territories is consistent with Section 6 of the ESA and lastly to enforce the same regarding the customer in this case. The commission has the sole authority under the ESA to do this. Kruger v Menard Electric Cooperative 169 Ill App 3d 861, 523 NE 2d 708; 119 Ill Dec 952 (4th Dist. 1988) does not prohibit this procedure but in fact requires that the Commission determine if the map constitutes a designation of service territory between Jo-Carroll and Interstate and if so approve the same before enforcing it (see Kruger v Menard Electric Cooperative and Central Illinois Public Service Company ESA 250 (Dec. 7, 1988). Section 6 of the ESA does not create a time period within which the arrangement for designating service territories as between electric suppliers must be submitted to the Commission for approval after such arrangement has been made. Accordingly, the affirmative allegations contained in Interstate's Motion to Strike are meaningless unless supported by Affidavit and are in the nature of affirmative defenses which are appropriately part of the answer to Count II of the Amended Complaint. As such the Interstate affirmative allegations must be subjected to an evidentiary hearing.

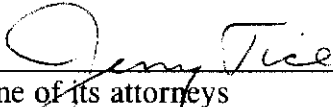
VI. SUMMARY.

The mixture by Interstate of affirmative allegations in its Motion to Strike with the filing of an answer to Count II is not only confusing but improper. Once Interstate files its answer to Count II and makes affirmative allegations thereto, it is deemed to have waived any claimed deficiency as to Count II. Further, if the Commission finds it must consider Interstate's Motion to Strike, then the allegations of Count II stand admitted and the allegations plead facts setting forth all the elements of a Section 6 agreement. Wherefore, Jo-Carroll Energy Inc., respectfully requests the Illinois Commerce Commission to deny Interstate's

Motion to Strike Count II of the Amended Complaint, to construe Interstate's response to Count II to be an Answer thereto by Interstate, and for such other relief as the Commission deems just and equitable.

JO-CARROLL ENERGY INC.,
Complainant,

By: GROSBOLL, BECKER, TICE & REIF

By: 
One of its attorneys

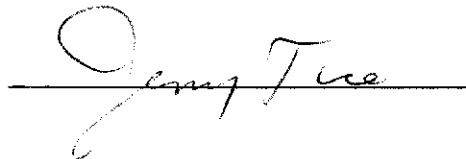
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PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 26 day of March, 2003, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to the following persons at the addresses set opposite their names:

Michael Wallace
Administrative Law Judge
Illinois Commerce Commission
527 E. Capitol
Springfield, IL 62701-1827

Leslie Recht Service also by Fax
Defress & Fiske
200 S. Michigan Ave.
Suite 100
Chicago, IL 60604

A handwritten signature in cursive script, reading "Jerry Tice", is written over a horizontal line.

GROSBOLL, BECKER, TICE & REIF
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